No. 10-1491

In The
Supreme Court of the United States

ESTHER KIOBEL, individually and
on behalf of her late husband, et al.,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., et al.,

Respondents.

**On A Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit**

BRIEF OF KBR, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Alien Tort Statute permits claims under customary international law against private corporations alleging human rights violations.

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INTEREST OF *AMICUS CURIAE*[1]

With more than 28,000 employees in 45 countries on five continents, *amicus curiae* KBR, Inc. ("KBR") is a global engineering, construction, and services company supporting the energy, hydrocarbon, government services, minerals, civil infrastructure, power, and industrial sectors. As a matter of policy and conviction, KBR unequivocally rejects and condemns the practices of torture and extra-judicial killing and fully supports efforts to protect the human rights of all people and to hold violators of human rights under international law to account. To that end, KBR's Code of Business Conduct unambiguously requires the Company and its employees, in every instance, to treat all persons with dignity and respect and to comply with all applicable laws, rules, and regulations. The Code also establishes clear reporting procedures to ensure consistent accountability and compliance with these and other requirements.

KBR has a compelling interest in the Court's clarifying the proper objects of lawsuits alleging violations of international law and human rights norms. Despite its record of leadership and commitment to ethical business conduct, KBR is currently

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the Clerk.

defending against claims of alleged violations of human rights cognizable under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1595, and Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c). *See Adhikari v. Dauod & Partners*, No. 09-cv-1237 (S.D. Tex.). The plaintiffs allege a human-trafficking scheme based on conduct occurring outside of the United States, principally by employees of entities that are not party to U.S. litigation and with whom KBR had no business relationship, but whose behavior the plaintiffs allege should be imputed to KBR. The plaintiffs' highly attenuated theory of KBR's liability demonstrates precisely why "the customary international law of human rights has remained focused not on abstract entities but on the individual men and women who have committed international crimes." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 119 (2d Cir. 2010).

The Court's determination that corporate liability for the types of claims brought by the Petitioners is unsupported by the "'specific, universal, and obligatory'" norms of customary international law, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)), and therefore unavailable under the ATS, would prevent the U.S. courts from becoming an all-purpose forum for private torts alleged to be suffered at the hands of multinational corporations, while allowing victims of state-sponsored torture to vindicate their rights against the

actual individual perpetrators and their superiors. It would also provide certainty to global service providers like KBR, as well as other American firms operating overseas, and reduce the litigation risk of doing business abroad, particularly as a U.S. government contractor.

Accordingly, KBR offers this brief as *amicus curiae* to explain the lack of support for corporate liability under customary international law and the scope of this Court's discretion in recognizing causes of action based on customary international law under the ATS.

SUMMARY OF THE ARGUMENT

Neither the history nor practice of customary international law supports private corporate liability for Petitioners' claims. It is not a "definable, universal and obligatory" norm, as *Sosa* requires. In fact, international custom and practice show a consistent pattern rejecting such liability for these types of claims. Moreover, there is enormous variability in the practices of nations as to whether and how they enforce even the most fundamental human rights norms against private entities, much less private collective entities. This evidence alone is sufficient, under *Sosa*, for the Court to hold that the types of claims alleged by Petitioners in this case may not be brought against private corporations.

But if that were not enough, other considerations compel the same result. Congress codified international human rights law's focus on the acts of natural persons in the Torture Victim Protection Act ("TVPA, 28 U.S.C. § 1350 note § 2"), which unambiguously rejects corporate liability, and the Court should, for good reasons, defer to Congress's judgment on that point. Deciding otherwise would thrust the federal courts into sensitive areas of foreign policy and relations, far beyond their competence and the proper scope of the judicial power. This, in turn, would risk "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs," *Sosa*, 542 U.S. at 727, with potentially embarrassing results.

Corporate liability also presents grave practical difficulties in ATS cases, as courts struggle to ascertain the substance of, and apply, an enormously complex but decidedly under-determined body of law, without any guidance from Congress as to how to proceed. And then there is the difficulty and expense to defendants of conducting discovery and fact finding in cases with broad and vague legal theories that do not confine relevance and where relevant events occurred overseas, to say nothing of the injury that ongoing litigation can cause to a business's reputation. These difficulties are common even after *Sosa's* attempt to cabin ATS jurisdiction to clearly established causes of actions, and they will only multiply in number and burden if the Court permits this type of abusive litigation to continue.

For these reasons, the Court should hold that the Alien Tort Statute does not permit claims alleging human rights violations against private corporations.

ARGUMENT

I. The Court Must Look to the Law of Nations to Determine the Scope of Liability for Claims Under the ATS

Customary international law itself – not federal common law, the Court's own judgment, or any other source – appropriately sets the outer boundaries for liability for claims that may be brought under the ATS. This Court held as much in *Sosa*: "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted," such as piracy. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). Specifically, a federal court must consider not only whether a particular norm is "sufficiently definite to support a cause of action," *id.*, but also "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual," *id.* at 732 n.20; *see also id.* at 760 (Breyer, J., concurring) (explaining that, to obtain customary status, a "norm [of international law] must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue."). Put

simply, a cause of action defines permissible defendants. *See, e.g.*, 28 U.S.C. § 1350 note § 2 (limiting TVPA liability to "individual[s]" who have engaged in particular forms of conduct).

The plain text of the ATS requires this limitation on the types of defendants who may be liable for violation of any particular norm. The ATS provides jurisdiction only for those claims alleging violations of "the law of nations or a treaty of the United States." 28 U.S.C. § 1350. It does not authorize jurisdiction where international law itself precludes liability or authorize federal courts to recognize claims that, being directed at improper defendants, are unknown to international law.[2]

The canons of statutory interpretation also compel this limitation. Although Congress's precise intentions in enacting the ATS are unknown, *see IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) ("no one seems to know whence it came"), the Court does presume that Congress "legislate[s] against a background of common-law . . . principles," *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991), and it has long enforced "the presumption

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[2] *Amicus* takes no position on the first question presented by the Petition for Certiorari, which concerns whether the issue of corporate liability is a matter of subject matter jurisdiction or the merits of a claim. In either case, where international law does not recognize corporate liability for a particular claim, a federal court could not, consistent with the statutory text, allow such a claim to proceed against a corporate defendant.

that Congress intended to retain the substance of the common law," *Samantar v. Yousef*, 130 S.Ct. 2278, 2289 n.13 (2010). Accordingly, the Court reads statutes to "favor[ ] the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident," *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952), and will not presume that Congress intended the opposite, *Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l Protection*, 474 U.S. 494, 501 (1986). As the Court has recognized, "scope of liability" is an aspect of the "narrow set of common law actions derived from the law of nations," *Sosa*, 542 U.S. at 721, 732 n.20, and the ATS should therefore not be read to disregard it.

Divorcing conduct from scope of liability when recognizing claims under the ATS threatens to put U.S. law sharply at odds with international law regarding the conduct of foreign entities in foreign lands, contrary to this Court's repeated admonitions that such conflict is to be avoided at the statutory-construction phase. In particular, statutes "should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting). This is a corollary of the *Charming Betsy* canon, holding simply that Congress is generally presumed to exercise its powers consistent, rather than in conflict, with international law. *Id.* Following this approach, the Court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382-84 (1959),

held that Jones Act jurisdiction did not extend to a foreign seaman's claims against his foreign employer for injuries that occurred while temporarily in U.S. waters. Though the question before the Court was statutory in nature, the "controlling considerations," where the statute did not speak directly to the question at hand, "are the interacting interests of the United States and of foreign countries" and, in particular, the well-established international norm recognizing the "interests of foreign nations in the regulation of their own ships and their own nationals." *Id.* at 383-84. *Accord Lauritzen v. Larsen*, 345 U.S. 571, 576 (1953) (recognizing that Congress had legislated "not on a clean slate, but as a postscript to a long series of enactments governing shipping," and had acted "with regard to a seasoned body of maritime law"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (interpreting National Labor Relations Act in harmony with "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship"). There is no reason here, where the ATS's language is best read as incorporating the principles of international law, to interpret the statute otherwise.

Finally, customary international law is amenable to being applied through the ATS in this manner. The law of nations principally governs the rights and obligations of nations, without any application to the acts of non-state entities; these norms are unavailable to individuals seeking relief in court under the

ATS. *Cf. Sosa*, 542 U.S. at 720 (citing 4 *W. Blackstone, Commentaries on the Laws of England* 68 (1769)). For the remaining "relatively modest set of actions alleging violations of the law of nations" available to private litigants, the scope of liability may be determined by recourse to history and practice demonstrating "definite content and acceptance among civilized nations," as well as attention to "practical consequences." *Id.* at 732-33. The Court is well-acquainted with this manner of inquiry, recognizing it as obligatory in determining the norms of customary international law. *Id.* at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). As demonstrated below, with respect to the claims at issue in this case, the usual sources and authorities do, in fact, answer what types of defendants may be liable for violation of a particular international-law norm.

Accordingly, the Court should interpret and apply the ATS just as it described in *Sosa*, by looking to customary international law to determine whether a particular norm's application to a type of defendant is sufficiently specific and accepted to support the asserted cause of action.

II. Private Corporations Are Outside the Scope of Liability for Violations of Human Rights Norms Under International Law

For the same reasons, and more, that the Court declined to recognize the cause of action asserted in

Sosa, it should also reject corporate liability under customary international law for the types of claims alleged by Petitioners in this case. Not only do the usual sources and reporters of international norms fail to support the liability of non-state collective entities for human rights violations, but those sources, as well as U.S. statutory law, provide compelling evidence that corporate liability is precluded in this case.

A. Customary International Law Precludes Corporate Liability for Violations of Human Rights Norms

Even if, in general, customary international law does not preclude corporate liability in every instance, it is not available in this instance for the particular claims alleging violations of human rights norms brought by Petitioners.[3]

As an initial matter, private-party liability for violations of the "law of nations" is itself exceptional and should not be lightly assumed. *See Sosa*, 542 U.S. at 719-20. Customary international law has traditionally defined the rights and obligations only of

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[3] *Amicus* assumes, *arguendo*, that aiding and abetting liability is available under customary international law and that it may properly apply to corporate entities such as Respondents. Neither proposition, however, finds substantial support in history and practice, which would be an additional independent basis for rejecting liability in this instance.

sovereigns, and accordingly, most norms apply to sovereign states alone:

> Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.

1 *L. Oppenheim, International Law: A Treatise* 19 (H. Lauterpacht 8th ed. 1955).

Historically, this general rule recognized only a narrow exception for the perpetrators of such offenses as piracy, individuals long deemed *hostis humani generis* ("enemies of mankind"). *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (Edwards, J., concurring) (quoting *Oppenheim, International Law: A Treatise* 609). This Court has recognized the specific and narrow scope of this exception, defined both by conduct and by the status of perpetrators. *Sosa*, 542 U.S. at 732 (discussing "historical antecedents"); *The Malek Adhel*, 43 U.S. 210, 232 (1844) (defining piracy under "the general law of nations"); *United States v. Klintock*, 18 U.S. 144, 151-52 (1820) (anti-piracy offense "ought not to be so construed as to extend to persons under the acknowledged authority of a foreign State"). In all other instances, customary international law governed only the relations of states.

"These formal and rigid categories of traditional international law" have only recently eased, and this phenomenon has only advanced so far. *See* Julian Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute*, 51 Va. J. Int'l L. 353, 378 (2011). Consensus over the liability of natural persons who have *directly and personally engaged* in torture, extrajudicial killing, and other human-rights offenses has developed, and continues to develop, at a gradual pace. This Court recognized as much in *Sosa* by its approving citation of Judge Edwards's scholarly concurrence in *Tel-Oren*. *Sosa*, 542 U.S. at 732 n.20. Judge Edwards identified the difficulty with identifying an unequivocal international law norm applicable to private parties. Answering that question

> would require this court to venture out of the comfortable realm of established international law . . . in which states are the actors. It would require an assessment of the extent to which international law imposes not only rights but also obligations on individuals. It would require a determination of where to draw a line between persons or groups who are or are not bound by dictates of international law, and what the groups look like. . . . As firmly established as is the core principle binding states to customary international obligations, these fringe areas are only gradually emerging and offer, as of now, no obvious stopping point.

Tel-Oren, 726 F.2d at 791 n.20 (Edwards, J., concurring). The "degree of 'codification or consensus,'"

Judge Edwards concluded, "is simply too slight" to establish a binding norm of private liability. *Id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)). Where the Court's decision in *Sosa* cited authority suggesting that an international law norm applicable to private individuals (not even private collective entities) was sufficiently universal to be cognizable under the ATS, *see Kadic v. Karadzic*, 70 F.3d 232, 239-41 (1995), the legal norm was codified by treaty and clearly established in the aftermath of the Second World War, placing a strong and administrable "limit upon judicial recognition" of private claims premised on customary international law. *Sosa*, 542 U.S. at 732.

Standing in stark contrast is the absence of any precedent in the practices of nations holding private collective entities liable for violations of human rights norms such as torture. A current survey of international legal sources finds "embarrassingly little evidence of an international consensus (or even of international support) in favor of imposing liability on private corporations for general violations of customary international law." *Ku*, *supra*, at 355. This holds true from the very dawn of the development of modern private-actor liability. As Judge Korman explained in his *Khulumani* dissent, the London Charter, which created the International Military Tribunal at Nuremberg, did not confer jurisdiction over corporations, only over "persons who, . . . as individuals or as members of organizations," committed certain crimes. *Khulumani v. Barclay National*

Bank Ltd., 504 F.3d 254, 321-22 (2d Cir. 2007) (Korman, J., dissenting) (quoting Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544 (1945), 82 U.N.T.S. 279). Practice bore this out: no corporations were named as defendants at Nuremberg. *Id.* at 322; *see also Ku*, *supra*, at 379-81 (collecting primary sources); *id.* at 381 (quoting Nuremberg Tribunal opinion's rejection of corporate liability).[4]

Subsequent practice is consistent in rejecting collective-entity liability. In 1953, for example, the Committee on International Legal Jurisdiction, charged to consider aspects of a proposed international criminal tribunal under the auspices of the United

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[4] The dissolution of I.G. Farben is not to the contrary. First, Farben was not, in fact, a defendant at the Nuremberg Tribunals. *See* 8 *Trials of War Criminals Before the Nuernberg Military Tribunals* 1153 (1948) ("Farben [ ] is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. . . . But corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it."). Second, Farben's breakup was not a result of the application of international law, and did not occur as the result of any judicial process, but was a political action by the Allies. Control Council Law No. 9, Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control thereof (Nov. 30, 1945). The preamble to this law states, quite clearly, its pragmatic purpose: "to insure that Germany will never again threaten her neighbors or the peace of the world. . . ." *Id.*

Nations, rejected jurisdiction over corporations on the ground that "it was undesirable to include so novel a principle as corporate criminal responsibility in the draft statute." *Report of the Committee on International Criminal Court Jurisdiction*, U.N. GAOR, 9th Sess., Supp. No. 12, U.N. Doc. A/2645 ¶85 (1954). As Judge Korman recounts, a similar proposal was rejected in negotiations for the Rome Statute, which established the present International Criminal Court, for three reasons:

> (1) "from a pragmatic point of view it was feared that the ICC would be faced with tremendous evidentiary problems when prosecuting legal entities"; (2) "from a more normative-political point of view it was emphasized that the criminal liability of corporations is still rejected in many national legal orders, and international disparity which could not be brought in concord with the principle of complementarity"; and (3) "it was felt morally obtuse for States to insist on the criminal responsibility of all entities other than themselves."

Khulumani, 504 F.3d at 323 (Korman, J., dissenting) (quoting Albin Eser, *Individual Criminal Responsibility, in 1 Antonio Cassese et al., The Rome Statute of the International Criminal Court: A Commentary* 767, 778-79 (2002)); *see* Rome Statute of the International Criminal Court art. 25(1), July 17, 1998, 2187 U.N.T.S. 90 (limiting jurisdiction to "natural persons").

Nor do the international criminal tribunals established by the United Nations Security Council to prosecute war crimes in the former territories of Yugoslavia or Rwanda recognize corporate liability. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, annex art. 7(1), U.N. Doc. S/25704 (May 3, 1993) (limiting scope of liability to individuals for International Criminal Tribunal for the former Yugoslavia); Security Council Resolution 955, annex art. 6(1), U.N. Doc. S/RES/955 (Nov. 8, 1994) (same for International Criminal Tribunal for Rwanda). And in practice, neither tribunal has brought charges against any juristic person. *Ku*, *supra*, at 383. This is particularly significant because these tribunals, while fashioning their own procedural rules, were charged by the Security Council to apply existing substantive international law norms. *Id.* at 384.

Moreover, treaty law does not evidence or support corporate liability for violations of the customary international law norms at issue. As Professor Ku explains, most treaty law is generally incapable of providing direct support for corporate liability, or at least irrelevant in that respect: "Almost every treaty regime imposes liability indirectly by formally imposing an obligation on state parties to impose duties on private parties. Treaties cannot impose duties on private parties directly because private parties are not competent to make treaties under international law." *Ku*, *supra*, at 384. Thus, for example, the Convention Against Bribery of Foreign Government

Officials does not regulate juristic persons directly, but requires, instead, that state parties do so. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2, Dec. 17, 1997, 112 Stat. 3302 (1988), 37 I.L.M. 1; *see also* United Nations Convention Against Transnational Organized Crime art. 5(1)(b), Nov. 15, 2000, 2237 U.N.T.S. 319 (same approach).

But treaty law does provide further evidence that private liability for violations of international norms concerning human rights is limited to natural persons. Whereas the Convention Against Bribery at least references juristic entities, the Convention Against Torture does not even take that step; to the contrary, it strongly suggests that the offenses it defines may only be committed by natural persons. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 6(1), 6(3), Dec. 10 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (referring to suspected perpetrators as "he" and "him"). Treaties addressing arguably analogous norms, such as genocide, similarly do not provide for the liability of juristic persons. *See* Convention on the Prevention and Punishment of the Crime of Genocide, art. 4, Dec. 9, 1948, 102 Stat. 3045 (1988), 78 U.N.T.S. 277.

Based on these and other treaties, as well as international practice implementing treaties, a recent United Nations survey on the topic rejects corporate liability for human rights violations. *Report of the Special Representative of the Secretary-General on the*

Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶44, 4th Sess., Feb. 9, 2007, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) [hereinafter "U.N. Report"]. It concludes that, while "corporations are under growing scrutiny by the international human rights mechanisms," "it does not seem that the international human rights instruments [surveyed in the U.N. Report] currently impose direct legal responsibilities on corporations." *Id.*; *see generally Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms*, ¶35 *et seq.*, 4th Sess., Feb. 28, 2007, U.N. Doc. A/HRC/4/35/Add. 3 [hereinafter "U.N. Survey"] (finding, *inter alia*, that less than "30 per cent of responding States have a national legal system permitting the prosecution of legal persons, and enable extraterritorial jurisdiction over human rights violations committed overseas").

As a result of the absence of practice of corporate liability for violations of international human rights norms, corporate liability doctrine lacks "a specificity comparable to the features of the 18th-century paradigms" like piracy, *Sosa*, 542 U.S. at 725, such that international law would provide a court with no firm guide to its judicial administration. When and how shall the acts of a corporate agent, employee, or officer that may themselves amount to a cognizable violation of human rights be attributed to the corporate entity itself? What degree of intent need be demonstrated to hold the corporation liable? May courts "pierce the corporate veil" to reach parent

companies and beneficial owners, and if so, what showing is required to do so? Most fundamentally, at what point is responsibility so attenuated that liability ends? Unlike the case with the obligations of states or individuals, customary international law provides no accepted answer to these questions, and national domestic practices vary widely. *See* U.N. Report ¶¶28-32, 34 (describing "significant national variations [that] remain in modes of attributing corporate liability"); U.N. Survey ¶¶35-39 (summarizing survey responses regarding practices for investigating, adjudicating, and punishing alleged violations of human rights).

This severe under-determination of the law indicates the impossibility, under present doctrines, of applying norms of international law to corporate defendants in any consistent fashion. Once again, the "degree of 'codification or consensus' is simply too slight," *Tel-Oren*, 726 F.2d at 792 (Edwards, J., concurring), to establish a binding norm of corporate liability for human rights violations under customary international law.

Accordingly, the Court should find, based on unanimity in practice and the lack of specific standards to apply, that private corporations stand outside the scope of liability for the types of human-rights claims brought by Petitioners under the ATS.

B. Congress Has Recognized and Codified This Limitation of International Law in the Torture Victim Protection Act

That conclusion also finds strong support in the text of the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note § 2, which codifies customary international law's norms against torture and extrajudicial killing.

Congress enacted the TVPA to clarify that U.S. law does provide a cause of action for these offenses. It was driven to act by Judge Bork's concurrence in *Tel-Oren*, 726 F.2d at 813, which cast doubt on the existence of a private right of action for victims of torture and terrorism under the ATS. Endorsing the view that the ATS "gave Federal courts jurisdiction over allegations of torture since torture violates the 'law of nations,' Congress enacted the TVPA to "establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law." S. Rep. No. 102-249, at 3 (1991); *accord* H.R. Rep. No. 102-367 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86 ("The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789. . . ."). Its stated intention was not to deviate, in any way, from customary international law, but merely to codify it into a cause of action under U.S. law. *Id.* This Court has recognized this close relationship between the TVPA and the ATS by ordering that

the instant case be argued in tandem with *Mohamad v. Palestinian Auth.*, No. 10-1491, which raises the issue of corporate liability under the TVPA.

The TVPA's unambiguous rejection of corporate liability should be taken as compelling evidence of the substance of customary international law. By employing the word "individual" to refer to perpetrators of cognizable offences, Congress made unequivocally clear its intention that the TVPA would recognize only natural persons as defendants, and not corporations. *See, e.g.*, *Webster's Third New International Dictionary* 1152 (1971) (defining "individual" as "a single human being[,] as contrasted with a social group or institution."). The statutory context, markup history, and committee reports demonstrate that this was a considered choice for a statute that received extensive debate and scrutiny over several Congresses. *See, e.g.*, *The Torture Victim Protection Act: Hearing and Markup before the H. Comm. on Foreign Affairs on H.R. 1417*, 100th Cong. 82, 85 (1988) (explaining substitution of "individual" for "person" to "make it clear [Congress was] applying it [the Act] to individuals and not to corporations"). The Court should defer to this vision of the law. *Sosa*, 542 U.S. at 726 (explaining, where foreign relations are concerned, the Court's "general practice has been to look for legislative guidance before exercising innovative authority over substantive law").

Finally, a contrary ruling that authorizes corporate liability for the same claims recognized by the TVPA would establish an unusual incongruity in the

law.[5] Foreign plaintiffs alone could rely upon the ATS to bring claims against corporate defendants for torture and extrajudicial killing, but domestic victims, who are excluded from ATS jurisdiction but may sue under the TVPA, would be denied a cause of action. While there are persuasive reasons that Congress would have sought to reject corporate liability in all instances, there is no apparent or obvious reason that Congress would have chosen to deny it for U.S. victims alone. A proper view of international law as not authorizing corporate liability for human-rights violations avoids this incongruity.

III. The Court Should Not Recognize a Cause of Action Against Private Corporations

Even assuming, *arguendo*, that customary international law recognizes corporate liability for human rights violations, the Court should exercise "judicial caution" and decline to formulate a new common law principle that authorizes and implements such claims. In particular, the policy concerns cited in *Sosa* as arguing for judicial restraint, 542 U.S. at 725-28, apply with even greater force in this instance. Accordingly, the Court must give serious consideration to the "practical consequences," *id.* at 733, that would flow from a decision recognizing corporate liability.

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[5] *Amicus* assumes, *arguendo*, that the TVPA does not "occupy the field" as to claims of torture and extrajudicial killing, thereby preempting any possible ATS liability. *But see Enahoro v. Abubakar*, 408 F.3d 877, 884-85 (7th Cir. 2005).

A. Federal Common Law Is Particularly Disfavored Where It Implicates Foreign Relations

The Court should not exercise its discretion to recognize a common law norm of corporate liability for alleged violations of international law norms in foreign lands that injure foreign plaintiffs.

As an initial matter, the ATS, by its terms and as interpreted by the Court, affords courts their customary discretion over recognizing and implementing common law doctrines, limited by the bounds and metes of the "law of nations." *See Sosa*, 542 U.S. at 725 (discussing the "discretion a federal court should exercise in considering a new cause of action" under the ATS). Thus, a court's decision to recognize a particular cause of action "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732-33; *see also American Elec. Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527, 2536 (2011) ("Recognition that a subject is meet for federal law governance, however, does not necessarily mean that federal courts should create the controlling law.").

While the creation of new rights and obligations under federal common law is now disfavored, it is even more strongly so in the area of foreign relations. "It is emphatically the duty of the Judicial Department to say what the law is," and not what it ought to be, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177

(1803), and legislative power is vested in Congress, not the Judiciary. *See* U.S. Const. art. I, § 1. Accordingly, "instances where [the Court has] created federal common law are few and restricted" since the "free-wheeling days antedating *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). And where the Court has exercised its discretion to recognize common law remedies, it has done so sparingly, in light of the limits of both judicial competence and the judicial power. *E.g., Tex. Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646-47 (1981) (declining to recognize federal common-law rule of contribution among antitrust wrongdoers because "this is a matter for Congress, not the courts, to resolve").

But where, as here, international relations are implicated, there is a uniquely "high bar to private causes of action." *Sosa*, 542 U.S. at 227. So it must be, in light of the Constitution's assignment of power over foreign affairs to Congress and the Executive Branch. Thus the *Sosa* court stated:

> [T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign

> governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits. Yet modern international law is very much concerned with just such questions, and apt to stimulate calls for vindicating private interests in [ATS] cases. Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.

Id. at 727-28 (citations omitted). Accordingly, the Court's "general practice has been to look for legislative guidance before exercising innovative authority over substantive law." *Id.* at 726.

The ATS, in itself, provides no clear guidance for the Court's exercise of its discretion, and the Court must therefore exercise caution before recognizing a broad new field of liability fraught with policy consequences. The TVPA's express rejection of corporate liability for human rights violations suggests, at the very least, the same. The Court should tread warily in this field.

B. ATS Claims Against Corporations Present Enormous Practical Difficulties

A decision recognizing corporate liability would risk the transformation of U.S. courts into an all-purpose forum for all manner of private torts alleged to be suffered at the hands of multinational

corporations. Indeed, this trend is already evident in existing ATS litigation, particularly in the many prominent cases brought against corporations for "aiding and abetting" human rights violations in which they had no direct involvement.

Khulumani v. Barclay National Bank Ltd., 504 F.3d 254 (2d Cir. 2007), should serve as a cautionary example of the difficulties that federal courts will increasingly face if the Petitioners' claims are allowed to proceed. The plaintiffs alleged that approximately fifty corporate defendants aided and abetted the government of South Africa in maintaining its systematic repression of the country's majority black population. *Id.* at 258. Judge Korman described the gravamen of the plaintiffs' claim:

> The portions of the complaints relating to defendants' alleged conduct focus principally on their trade with South Africa. Thus, car companies are accused of selling cars, computer companies are accused of selling computers, banks are accused of lending money, oil companies are accused of selling oil, and pharmaceutical companies are accused of selling drugs. The theory of the complaints is that in this way defendants facilitated or "aided-and-abetted" apartheid and its associated human rights violations. To support that theory, the complaints allege generally that defendants knew of the racist policies of apartheid; that they nevertheless so engaged in the transactions in and with the Union of South Africa; and that, had they not done so,

> the apartheid regime would have collapsed, apartheid would have ended sooner, and plaintiffs would not have suffered some or all of their injuries. The causal theory advanced by the *Khulumani* plaintiffs is even weaker: "Apartheid would not have occurred in the same way without the participation of defendants."

Id. at 294 (Korman, J., dissenting) (citation omitted). On this basis, the plaintiffs sought damages for "all acts comprising the entire system of apartheid – a criminal enterprise." *Id.* at 295.

Lawsuits alleging violations by multiple multinational corporate defendants of uncertain legal norms in multiple, unspecified instances that occurred in foreign lands and against foreign victims raise a number of serious practical issues. First, U.S. courts are ill-suited and ill-placed to oversee discovery and factual development relating to broad claims that took place exclusively on foreign shores. This problem is compounded by broad theories of liability that may give rise to equally-broad evidentiary burdens. Defendants in such actions face this problem on both ends: they must investigate and seek out facts in a foreign country, while complying with detailed and far-reaching discovery requests into their own private files. Courts, in turn, bear the burden of overseeing this process, which may drag on through years of constant dispute, and then measuring up the evidence uncovered against uncertain legal standards.

Second is the difficulty, discussed above, of determining and then applying substantive customary international law against corporate entities when fundamental questions regarding the reach of liability are unanswered. For example, even while finding in *Khulumani* that corporate aiding and abetting liability was "sufficiently well-established and universally recognized under international law" to apply under the ATS, Judge Katzmann conceded that its "definition is not necessarily set in stone." 504 F.3d at 277 (Katzmann, J., concurring). Meanwhile, Judge Hall, who made up the other half of the *Khulumani* majority, adopted an entirely different definition for aiding-and-abetting liability, drawn from federal law. *Id.* at 288-89 (Hall, J., concurring). The law on this central issue is, if anything, less clear than before the Second Circuit's decision.

Third, such cases inevitably give rise to collateral consequences in the form of adverse "foreign policy consequences" that the federal courts are not equipped to resolve. *See Sosa*, 542 U.S. at 727-28. Indeed, in *Khulumani*, the Legal Advisor of the Department of State advised the court directly that "continued adjudication of the above-referenced matters risks potentially serious adverse consequences for significant interests of the United States" and that the litigation itself was "detrimental to U.S. foreign policy interests in promoting sustained economic growth in South Africa." 504 F.3d at 296-97. Nonetheless, without the court directly addressing this issue, the case was allowed to proceed. *Id.* at 263.

Fourth, such cases may also present an affront to the sovereignty of foreign nations. Indeed, the government of South Africa views *Khulumani* as a barrier to post-apartheid reconciliation. *Id.* at 301. In this way and others, open-ended ATS litigation may actually stymie the advancement of human rights in practice. *Cf.* Note, *The Conflict Between the Alien Tort Statute Litigation and Foreign Amnesty Laws*, 53 Vand. J. Transnat'l L. 505 (2010) (arguing that U.S. courts must ignore foreign amnesties in ATS cases).

Fifth is the unusual opportunity for the gaming judicial recusals presented by claims against corporations that broadly allege the aiding and abetting of state action. Under this type of theory, nearly any defendant that did business with a particular state may be an accomplice to its actions. By choosing to join certain corporate defendants, plaintiffs may force the recusal of judges known to hold shares in those corporations, in some instances coming close to selecting which judges will hear their case. Notably, this Court was unable to consider certiorari in *Khulumani* due to multiple recusals that denied it a quorum, which had the effect of affirming the judgment below in favor of the plaintiffs. *See American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008). If plaintiffs may continue to bring ATS cases premised on such broad theories of liability against corporate defendants, this precise situation will inevitably recur.

C. Recognizing Corporate Liability Will Open the Floodgates to Abusive Litigation

Despite *Sosa's* command that lower courts should not recognize private claims for violations of norms with "less definite content and acceptance" among nations as those familiar when the ATS was enacted, 542 U.S. at 732, human rights activists, anti-business campaigners, and academics continue to develop and pursue legal theories intended to thrust federal courts into enforcing their preferred norms under the ATS. Too often, as a practical matter, they succeed.

A broad literature is devoted to teasing out often-surprising norms of international law, usually by citation to and analysis of other words in this canon, as a prelude to litigation. *See, e.g.*, Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 Golden Gate L. Rev. 745 (2004) (arguing that the ATS should be used to enforce international environmental norms against multinational corporations); Vanessa Waldref, *The Alien Tort Statute after* Sosa: *A Viable Tool in the Campaign To End Child Labor?*, 31 Berkeley J. Emp. & Lab. L. 160 (2010) (arguing that, despite legal uncertainty, the ATS should be used to combat foreign child labor "[b]ecause corporations desire to avoid negative publicity, costly litigation, and the risk of damaging ATS precedent"); Matt Vega, *Balancing Judicial Cognizance and Caution: Whether*

Transnational Corporations Are Liable For Foreign Bribery Under the Alien Tort Statute, 31 Mich. J. Int'l L. 385 (2010) (arguing that "foreign bribery is a violation of the law of nations that should be actionable under the ATS"); Margaret Kwoka, *Vindicating the Rights of People Living with AIDS Under the Alien Tort Claims Act*, 40 Loy. U. Chi. L. J. 643 (2009) (arguing that pharmaceutical company's lawsuits to protect their intellectual property rights over AIDS treatments are themselves actionable under the ATS); Joel Slawotsky, *International Product Liability Claims Under the Alien Tort Claims Act*, 16 Tul. J. Int'l & Comp. L. 157 (2007) (arguing that product liability claims are cognizable under the ATS); Comment, *An Open Door To Ending Exploitation: Accountability for Violations of Informed Consent Under the Alien Tort Statute*, 155 U. Pa. L. Rev. 231 (2006) (arguing that violations of informed consent in clinical trials remain actionable under the ATS after *Sosa*); Joel Slawotsky, *The New Global Financial Landscape: Why Egregious International Corporate Fraud Should Be Cognizable Under the Alien Tort Claims Act*, 17 Duke J. Comp. & Int'l L. 131 (2006) (arguing that "select" instances of corporate fraud are actionable under the ATS).

Some of these novel theories have even been the subject of actual legal claims. *See, e.g.*, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (reversing dismissal of ATS action claiming that pharmaceutical manufacturer failed to obtain adequate informed consent).

As unlikely as many of these theories may be to survive a rigorous application of *Sosa's* principles, they need not necessarily overcome that hurdle to survive. In many cases, litigants may be able to delay or avoid real scrutiny by forcing recusals of judges believed to be unfavorable to their actions. Often, corporate defendants simply settle ATS claims, so as to avoid bad publicity, legal expenses, and the uncertain risk of a negative outcome. *See, e.g.*, *Wiwa v. Shell*: The $15.5 Million Settlement, *Am. Soc. of Int'l L. Insights*, Sept. 9, 2009 ("The cost of ongoing litigation and prospect of negative publicity from the trial (regardless of the verdict) probably played a role in the defendants' willingness to settle on the eve of trial," thirteen years after the case was brought.); *Major Corporations Settle Alien Tort Statute Cases Following Adverse Appellate Rulings*, 103 Am. J. Int'l L. 592 (2009) (reporting other pre-trial settlements of ATS claims).

Sosa did not, in the end, shut the courthouse doors to activists' claims against private corporations premised on highly-tenuous theories of liability under customary international law. A decision that authorizes corporate liability for violations of norms, despite that it is not established in history and practice, will unleash a flood of litigation, with many cases amounting to little more than attempts at extortion. Unfortunately, due to the practical difficulties of ATS litigation, many of these cases will linger for years, with some even being resolved in plaintiffs' favor.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to hold that the Alien Tort Statute does not permit claims alleging human rights violations against private corporations.

Respectfully submitted,

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